The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields

Major Michael J. Davidson, United States Army
Special Assistant United States Attorney, District of Arizona
Department of Justice
Phoenix, Arizona

Introduction

Oftentimes, situations arise when several servicemembers become the focus of a criminal investigation or face the prospect of a court-martial. Under such circumstances, defense counsel may wish to pursue a mechanism by which they can share important information, increase the level of cooperation, work to present a coherent and consistent defense, share the expense of expert witnesses or consultants, and generally present a unified front.[1] However, defense counsel may be hesitant to do so for fear of disclosing confidential communications or tipping off the prosecution to trial strategy.

The joint defense privilege[2] provides an effective means by which attorneys representing multiple clients can pool resources to meet a common legal threat. Indeed, the doctrine's "purpose is to encourage interparty communications such that the parties receive effective legal representation as well as to facilitate a just determination of the case."[3] To facilitate that laudatory purpose, the doctrine provides an evidentiary privilege to protect confidential communications among the co-accused and their counsel. In effect, it extends the attorney-client privilege to cover not just the attorney and client, but also *all* co-accused and their attorneys. Further, formal joint defense agreements provide a means of memorializing the exact terms of the common defense relationship, prior to entering into such an arrangement.[4]

Although commonly seen in federal drug and white collar crime cases,[5] such as corporate, environmental,[6] and procurement fraud prosecutions,[7] the joint defense privilege and formalized joint defense agreements rarely appear in the military justice system. Because the military courts recognized the privilege over twenty years ago,[8] and the military rules of evidence specifically provide for the privilege,[9] the paucity of relevant military case law suggests that the privilege is relatively

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1. Paul L. Perito, et. al., *Joint Defense Agreements: Protecting the Privilege, Protecting the Future*, 4 CRIM. JUST. 6 (Winter 1990); Gerald F. Uelmen, *The Joint Defense Privilege: Know the Risks*, 14 LITIG. 35, 38 (Summer 1988).

2. The joint defense privilege has also been referred to as the "common interest privilege" and the "pooled information situation." *In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 570 n.4 (Bankr. N.D.N.Y. 1995). Further, the joint defense doctrine has been referred to as "the 'allied lawyer' doctrine." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995).

3. *In re* Megan-Racine Assoc., 189 B.R. at 571; *see also* United States v. DeNardi Corp., 167 F.R.D. 680, 686 (S.D. Cal. 1996) ("The rationale for the privilege is clear: Persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims."); Note, *Separating The Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1280 (1990) [hereinafter Note] ("The policy underlying the joint-defense privilege, then, is to promote the general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others.").

4. Many lawyers are no longer satisfied with informal, oral agreements and are insisting that the entire agreement be reduced to writing. Michael G. Scheininger & Ray A. Aragon, *Joint Defense Agreements*, 20 LITIG. 11 (1994). Two legal commentators suggest that the terms of the agreement include:

> that the parties share a common interest; that the information exchanged falls within the attorney-client privilege and work product doctrine; that information is being exchanged solely to further common interests in connection with a particular matter; that information cannot be disclosed to third parties without the express consent of the party providing the information; that if any party receives a subpoena or other legal demand for materials provided under the agreement, that party must give notice to the party who provided the materials; that no party is required to share all information; and that nothing in the agreement precludes independent and separate representation of the best interest of one's client.

Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNSEL J. 553, 561-62 (Oct. 1995).

5. Robert S. Bennett, *Foreword to the Eighth Survey of White Collar Crime*, 30 AM. CRIM. L. REV. 441, 442, 450-51 (1993); *see also* Scheininger & Aragon, *supra* note 4, at 11 (Joint defense agreements "have become a staple of white collar litigation.").

6. Francis J. Burke Jr., et al., *Responding to a Government Environmental Investigation: Shaping the Defense*, 34 ARIZ. L. REV. 509, 538 (1992).

7. Many defendants in the Operation Ill Wind prosecutions entered into joint defense agreements. *See* ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 283, 287 (1995). Operation Ill Wind was the DOJ's most successful procurement fraud prosecutorial effort, generating convictions of forty-five individuals and six corporations and over $225 million in fines. Michael S. McGarry, *Winning The War on Procurement Fraud: Victory at What Price?*, 26 COLUM. J. L. & SOC. PROBS. 249, 277 (1993).

8. United States v. Brown, 20 C.M.R. 823 (A.F.B.R. 1955) (recognizing the privilege, but determining it did not apply under the particular facts of this case).

unknown within the military legal community. This article seeks to inform military attorneys of the joint defense doctrine's current legal status and to highlight its various advantages and dangers.

The Joint Defense Privilege

The joint defense privilege is an extension of the attorney client privilege and "protects communications between an individual and an attorney for another when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'"[10] The privilege "only protects communications between joint defense attorneys, or between a joint defense member (i.e., a target or defendant) and one or more of the joint defense attorneys."[11]

The privilege is not invoked when a single attorney represents multiple parties[12] or when multiple defendants without their attorneys present shared information.[13] Further, the joint defense privilege is not automatically triggered merely because an attorney represents one of several coaccused[14] or when that attorney interviews an unrepresented potential codefendant.[15] Further, the privilege does not protect confidential business communications in which legal concerns are peripheral.[16]

The privilege applies to both civil and criminal cases,[17] and it first appeared in published case law in 1871.[18] The privilege was subsequently recognized in published decisions by the miltary in 1955[19] and by the federal system in 1964.[20] Cur-

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9. Military Rule of Evidence 502 provides, in relevant part: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest . . . ." MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 502(a)(3)(1995) [hereinafter MCM]. Military Rule of Evidence 502(a) was taken from proposed Federal Rule of Evidence 503. *Id.* at 502 analysis, app. 22, A22-37.

10. United States v. Bay State Ambulance And Hosp. Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989) (citations omitted); *see also* United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993). The joint defense privilege also applies to the attorney work product doctrine. *In re* Imperial Corp. of Am., 167 F.R.D. 447, 455 (S.D. Cal. 1995); *see also In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 570 (Bankr. N.D.N.Y. 1995) ("Most commentators and courts view it as an extension of the attorney-client privilege or work-product doctrine.").

11. Matthew D. Forsgren, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 32 CRIM. L. REV. 217, 229 n.71 (1995) (citation omitted) (originally published in 78 MINN. L. REV. 1219 (1994)). When a party to a joint defense arrangement provides information to a codefendant's attorney, it is not necessary that the party's own attorney be present to enjoy the protection of the joint defense privilege. Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 391 (S.D.N.Y. 1975).

12. Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996) ("limited to situations where multiple parties are represented by separate counsel . . . ."). A similar, but analytically separate, privilege exists when a single attorney represents multiple clients. United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993); s*ee* Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) ("joint client doctrine"). *But cf.* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446-47 (S.D.N.Y. 1995) (merging the two doctrines).

13. United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (The privilege does not extend to conversations among the defendants when no attorney is present.); *see also* Forsgren, *supra* note 11, at n.71 ("The doctrine does not protect communications between members outside the presence of their attorneys.") (citations omitted); Perito, *supra* note 1, at 7 ("The joint defense privilege does not protect conversations between defendants outside the presence of counsel . . . ."); Note, *supra* note 3, at 1295 (Client-to-client communication is not protected because it "does not fit within any logical extension of the attorney-client privilege.") ("In addition, Proposed Rule 503(b)(3) . . . did not include client-to-client exchanges among protected exchanges.").

14. *See* United States v. Brown, 20 C.M.R. 823, 832-33 (A.F.B.R. 1955) ("Just because an attorney represents one of several co-accused, he does not automatically become by operation of law an attorney for all accused who constitute the side.").

15. Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982). Generally, federal courts have upheld the joint defense privilege when "a confidential relationship was found to exist, the defendants either had retained counsel who were present during the communications or the defendants had not retained counsel but were planning to join the defense team." United States v. Lopez, 777 F.2d 543, 553 (10th Cir. 1985).

16. *Walsh*, 165 F.R.D. at 18; *Bank Brussels*, 160 F.R.D. at 447 ("The doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation."); *see In re* Imperial Corp. of America, 167 F.R.D. 447, 455-56 (S.D. Cal. 1995).

17. *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981); *Bank Brussels*, 160 F.R.D. at 447 ("Although originally developed in the context of cooperation between codefendants in criminal cases, this extension of the doctrine is fully applicable to parties in civil cases as well."); Hicks v. Commonwealth, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (civil or criminal, plaintiffs or defendants); Visual Scene, Inc. v. Pilkington Brothers, 508 So.2d 437, 439 n.2 (Fla. Dist. Ct. App. 1987) ("Although less frequently seen, the 'common interests' privilege also applies to co-plaintiffs."); *see, e.g.*, United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993) (criminal); Matter of Bevill, Bresler & Schulman Asset Manag. Corp., 805 F.2d 120 (3d Cir. 1986) (bankruptcy); *see also* Burke, *supra* note 6, at 538 n.166 ("applicable in both civil and criminal settings").

18. Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871); Burke, *supra* note 6, at 539 ("In this country, the recognized wellspring of the joint defense doctrine is *Chahoon v. Commonwealth*.").

19. United States v. Brown, 20 C.M.R. 823 (A.F.B.R. 1955). The only other published military decision addressing a joint defense relationship is *United States v. Romano*, 43 M.J. 523 (A.F. Ct. Crim. App. 1995), *review granted* 44 M.J. 76 (1996). Neither case provides a detailed discussion of the joint defense doctrine in the military context.

rently, the joint defense privilege enjoys widespread acceptance within the American legal system.[21]

Because the joint defense privilege is an extension of the attorney-client privilege, courts require as a condition precedent to the applicability of the joint defense privilege that the confidential information fall under the protective umbrella of the attorney-client privilege or attorney work product.[22] "In other words, it confers no independent privileged status to documents or information."[23]

In the federal system, the privilege applies at the preindictment, investigatory stage, as well as after formal indictment.[24] By analogy, the military version of the privilege applies prior to preferral of charges, as well as after preferral or referral of charges. Indeed, the privilege should apply as soon as servicemembers reasonably suspect that they are, or will become, the objects of a criminal investigation.[25]

Once properly invoked, the privilege's scope is broad. It is not limited to confidential communications dealing specifically with trial strategy; the protection extends to general information shared between the parties that may prove useful in either present or future proceedings.[26] Indeed, federal courts "have extended the privilege to virtually any exchange of information among clients and lawyers on the same side of the case."[27] For example, courts have extended the privilege's protection to memoranda of grand jury witness testimony exchanged by counsel,[28] interclient communication in the presence of counsel,[29] and correspondence exchanged in an effort to organize a joint defense.[30]

It is uncertain whether the privilege protects the joint defense agreement itself, and the case law addressing this issue is almost nonexistent. Indeed, the author was able to discover only two unpublished decisions, both holding that such agreements were protected from disclosure.[31] In both cases, the courts opined that disclosure of the joint defense agreements would impermissibly reveal defense strategy.[32]

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20. Burke, *supra* note 6, at 540 (citing Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)). The privilege is now accepted throughout the federal court system. *Id*. at 539.

21. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 478 (D. Colo. 1992) ("widely accepted by courts throughout the United States"); *see* People v. Pennachio, 637 N.Y.S.2d 633, 634 (Sup. Ct., Kings County, 1995) (privilege exists in Virginia, Minnesota, Florida, Arkansas, Hawaii, Louisiana, Nevada, Oregon, South Dakota, Texas, and Wisconsin); State v. Maxwell, 691 P.2d 1316 (Kan. Ct. App. 1984) (privilege exists in Kansas). *But cf.* Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 429 (Cal. Ct. App. 1989) ("There is no 'joint defense privilege' as such in California . . . .").

22. *Metro*, 142 F.R.D. at 478; *see also In re* Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990) ("presupposes the existence of an otherwise valid privilege . . . ."); Sackman v. Liggett Group Inc., 167 F.R.D. 6, 19 (E.D.N.Y. 1996) ("[B]ecause the underlying communications were not subject to the attorney-client privilege, they do not acquire a privileged status as a result of communications being jointly undertaken."); *In re* Megan-Racine Associates, Inc., 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) ("The joint-defense privilege can only exist where there is an applicable underlying privilege, such as the attorney-client privilege or the work-product doctrine.").

23. *Metro*, 142 F.R.D. at 478.

24. Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (preindictment); *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (available during a grand jury investigation); *accord* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y 1995). ("not necessary for litigation to be in progress," civil case).

25. *See* Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("[T]here must be some realistic basis for believing that someone will become a joint defendant before a joint defense privilege can arise.").

26. Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) ("general information which was needed to appraise the parties of the nature and scope of the Grand Jury proceedings, in order to facilitate representation in those proceedings and in any future proceedings"); *see also* Uelmen, *supra* note 1, at 36 (federal system's "broad construction of the joint defense privilege [which] extend[s] it to cases involving actual or even contemplated litigation . . . ."). *But cf.* at 36 (several states limit the privilege to "pending action").

27. Uelmen, *supra* note 1, at 36 (citing *e.g.* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)).

28. *Hunydee*, 355 F.2d at 185.

29. *In re* Megan Racine Assoc., Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995).

30. Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir.), *cert. denied sub. nom.* Weinstein v. Eisenberg, 106 S.Ct. 342 (1985).

31. United States v. BiCoastal Corp., No. 92-CR-261, 1992 WL 693384, at *6 (N.D.N.Y. Sept. 28, 1992); *The Business Crimes Hotline*, 2 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 8 (Aug. 1995) (The New York State Supreme Court, New York County, held that the work product privilege protected disclosure of joint defense agreements, "as well as the mere fact of [their] existence . . . .") (citing In The Matter of the Two Grand Jury Subpoena Duces Tecum Dated January 5, 1995, S.C.I.D. No. 25016/95 (Roberts, J.)).

32. *BiCoastal Corp.*, 1992 WL 693384, at *6 (Disclosure of joint defense agreement "would be an improper intrusion into the preparation of the defendant's case."); *The Business Crimes Hotline*, *supra* note 31, at 8 (might reveal defense strategy).

On its face, a joint defense agreement merely evidences the creation and existence of an attorney-client relationship, which is generally not privileged.[33] However, if the agreement contains otherwise protected information, then the privilege applies, and the agreement may not be disclosed.[34]

Establishing the Privilege

Like any other privilege, the burden of establishing the joint defense privilege's applicability is on the party asserting it.[35] Specifically, the party claiming the privilege must establish "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived."[36]

Communications Made in the Course of a Joint Defense Effort

To qualify for protection under the privilege, the communication must be made in confidence[37] and made at a time when a joint defense effort either existed[38] or was being organized.[39] For a joint defense effort to exist, the parties need only have some legal interests in common; their respective legal positions need not be entirely compatible.[40] Indeed, the parties' common interest may be a minor one.[41]

In *United States v. McPartlin*, several individuals were prosecuted for their involvement in a bribery scheme to obtain a multimillion dollar municipal contract.[42] Prior to trial, defendants Robert McPartlin and Frederick Ingram joined in an effort to discredit diaries corroborating the testimony of a key prosecution witness.[43] As part of that effort, Ingram's investigator interviewed McPartlin, with the consent of counsel; Ingram then attempted to use at trial certain admissions made by McPartlin during the interview.[44] On appeal, Ingram chal-

33. *See* Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995) ("Generally, the attorney-client privilege does not safeguard against the disclosure of either the identity of the fee-payer or the fee arrangement."); Allen v. West Point-Pepperell Inc., 848 F. Supp. 423, 431 (S.D.N.Y. 1994) (retainer agreements and fee arrangements are not privileged); Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, (S.D.N.Y. 1994) ("attorney fee arrangements, including the general purpose of the work performed, are not generally protected from disclosure by the attorney-client privilege"); State v. Bilton, 585 P.2d 50, 51 (Or. Ct. App. 1978) (privilege does not extend to creation or existence of attorney-client relationship); SCOTT N. STONE & ROBERT K. TAYLOR, 1 TESTIMONIAL PRIVILEGES § 1.26, at 1-83 (2d ed. 1995) ("the existence of the attorney-client relationship is generally not a privileged matter").

34. *See Ralls*, 52 F.3d at 225 ("an attorney may invoke the privilege . . . if disclosure would 'convey information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client.'") (citation omitted); *Brooks*, 158 F.R.D. at 560 (Items that "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.") (citation omitted); STONE & TAYLOR, *supra* note 33, § 1.26 at 1-86 ("the substance of attorney-client communications, the client's motive for seeking legal advice, or details of the service provided . . .").

35. United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993); *see also* United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991); Matter of Bevill, Bresler & Schulman Asset Manag. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (court held party did not meet burden); *see* Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) (parties conceded the issue).

36. *Matter of Bevill*, 805 F.2d at 126; *see also In re* Imperial Corp. of America, 167 F.R.D. 447, 455 (S.D. Cal. 1995); Dome Petroleum Ltd. v. Employers Mutual Liability Ins. Co. of Wis., 131 F.R.D. 63, 67 (D.N.J. 1990).

37. United States v. Bay State Ambulance and Hosp. Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989); *see also In re* Megan-Racine Associates, Inc., 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) ("the joint-defense privilege is only applicable where the party asserting it can demonstrate an agreement between the parties privy to the communication that such communication will be kept confidential"); *see* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) (discussing attorney-client privilege generally).

38. *Dome Petroleum*, 131 F.R.D. at 67.

39. Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir.), *cert. denied sub. nom.* Weinstein v. Eisenberg, 106 S.Ct. 342 (1985) (communications privileged when "part of an ongoing and joint effort to set up a common defense strategy . . . ."); *see also* Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471 (D. Colo. 1992) ("must establish that . . . there was existing litigation or a strong possibility of future litigation . . . .").

40. United States v. McPartlin, 595 F.2d 1321, 1335-36 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also* Griffith v. Davis, 161 F.R.D. 687, 692 n.6 (C.D. Cal. 1995) ("The interests of the parties involved in a common defense need not be identical, and, indeed, may even be adverse in some respects."); *In re* Megan-Racine Associates, Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) ("courts have not required a total identity of interest among participants"); Visual Scene Inc. v. Pilkington Bros., 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987) (federal case law strongly suggests "that the common interests exception applies where the parties, although nominally aligned on the same side of the care, are antagonistic as to some issues, but united as to others"); Note, *supra* note 3, at 1291 ("Recently, courts have begun protecting communications regarding matters of common interest even when the parties' interests violently clash in other matters.").

41. *McPartlin*, 595 F.2d at 1335. In at least one case, a court upheld the applicability of the joint defense privilege to communications between a plaintiff and defendant in a multiparty civil case. *Visual Scene*, 508 So.2d at 441-42.

42. *McPartlin*, 595 F.2d at 1327.

43. *Id.* at 1335.

44. *Id.*

lenged the court's exclusion of this evidence based on the existence of an attorney-client privilege.[45]

Finding that a joint-defense privilege existed, the United States Court of Appeals for the Seventh Circuit rejected Ingram's argument that in order for such a privilege to apply "the co-defendant's defenses must be in all respects compatible . . . ."[46] To trigger the privilege, the codefendants need only have "*some* interests in common . . . ."[47] In *McPartlin*, the parties' common interest in discrediting one piece of evidence by one prosecution witness was enough.

Additionally, the common interests must be legal ones. The communications must relate to matters that may expose the parties to criminal or civil liability.[48] In *United States v. Aramony*, the United States Court of Appeals for the Fourth Circuit rejected the applicability of the joint defense privilege, holding that discussions designed merely to preserve "one's reputation is not a legal matter."[49]

Statements Designed to Further the Effort

Most courts construe this element broadly in favor of finding that the privilege exists. The confidential communications need not involve trial strategy or defenses; the mere pooling of general information or discussions of case-related matters of mutual interest is enough.[50]

However, the sharing of the confidential information must have been accomplished "for the purpose of mounting a common defense . . . ."[51] Communications concerning "matters of conflicting interest do not promote a common interest" and are not protected.[52] In *Vance v. State*,[53] the Supreme Court of Tennessee held the privilege inapplicable to certain admissions when the defendant held a conference with his co-defendant and their respective lawyers so that the defendant could plan *his* defense rather than planning a *joint* defense.[54]

Privilege Not Waived

The joint defense doctrine acts as an exception to the general rule that disclosure of confidential attorney-client communications to a third party waives the privilege[55] by extending the privilege to protect confidential communications made among a group of parties joined by a common interest.[56] Accordingly,

45. *Id.*

46. *Id.* at 1336.

47. *Id.* (citation omitted).

48. United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).

49. *Id.*

50. Hunydee v. United States, 355 F.2d 183, 184-85 (9th Cir. 1965) (discussing, in part, Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)).

51. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 479 (D. Colo. 1992); *see also* United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982) ("Communications among attorneys and codefendants are privileged only if the communications are designed to further a joint or common defense."); People v. Pennachio, 637 N.Y.S.2d. 633, 634 (Sup. Ct. Kings County 1995) ("Only those communications made in the course of an ongoing common enterprise intended to further the enterprise are protected.").

52. Note, *supra* note 3, at 1290.

53. 230 S.W.2d 987 (Tenn.), *cert. denied* 339 U.S. 988 (1950)

54. *Vance*, 230 S.W.2d at 991 (emphasis added).

55. "Regardless of the client's intention not to waive the privilege, the privilege will generally be deemed waived where confidential communications are disclosed, or allowed to be disclosed, to persons outside the professional attorney-client relationship." STONE & TAYLOR, *supra* note 33, § 1.45; *see* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) ("As a general rule, disclosures in the presence of third parties destroys the confidentiality of the communication, thus rendering the communication unprotected by the privilege."); Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) ("in general principle it is universally acknowledged, that communications between a client and his counsel in the presence of a 'third party,' i.e., one who stands in a neutral or adverse position vis-a-vis the subject of the communication, bespeaks the absence of such confidentiality and thus belies any subsequent claim to the privilege"); Visual Scene, Inc. v. Pilkington Bros., 508 So.2d 437, 439 (Fla. Dist. Ct. App. 1987) ("In most cases, a voluntary disclosure to a third party of the privileged material, being inconsistent with the confidential relationship, waives the privilege.").

56. *In re* LTV Securities Litigation, 89 F.R.D. 595, 604 (N.D. Tex. 1981) ("joint defense exception to the general rule that no privilege attaches to communications made in the presence of third parties"); *see also* Griffith v. Davis, 161 F.R.D. 687, 692 (C.D. Cal. 1995) (prevents waiver "to the extent confidential communications are shared between members of a joint defense."); *Visual Scene*, 508 So.2d at 439 (exception to the general waiver rule); *see* United States v. Romano, 43 M.J. 529 n.10 (A.F. Ct. Crim. App. 1995) (disclosure of communication between lawyers while engaged in cooperative defense did not waive the privilege); *Hunydee*, 355 F.2d at 184-85 (rejecting government's waiver arguments). Analogizing to the attorney-client privilege, "the joint-defense privilege operates as an exception to the rule that divulging confidential information to third parties waives the attorney-client privilege." Note, *supra* note 3, at 1278.

"communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with codefendants for purposes of a common defense."[57] Confidential communications remain privileged when revealed during a joint defense meeting to unrepresented nonparties as long as they share the common interest.[58]

In both the criminal and civil contexts, the privilege extends not only between actual codefendants, but also among *potential* codefendants, such as "co-respondents in a grand jury investigation."[59] Further, the privilege extends to members of a defense team. Confidential communications made to a joint defense attorney's investigator[60] and accountant[61] have been deemed privileged.[62]

Disclosure to a third party may waive the privilege.[63] However, as a general rule, a voluntary waiver of the joint defense privilege requires the unanimous consent of all participating members.[64] Absent such consent, an individual member of a joint defense group may only waive the privilege as to himself.[65] Remaining members of a joint defense relationship cannot preclude cooperating parties from revealing their own statements.[66]

In *Western Fuels Ass'n v. Burlington Northern R.R. Co.*,[67] the United States District Court for the District of Wyoming explained that a waiver of the privilege "relating to information shared in joint defense communications by one party to such communications will not constitute a waiver by any other party to such communications."[68] Otherwise, the vitality of a joint defense relationship would be vitiated "by the fear that a party

57. United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); Further, the privilege is not lost when the accused's lawyer makes an unauthorized disclosure to the lawyer of a joint defense coaccused. *Romano*, 43 M.J. at 528-29. "The lawyer-client privilege belongs to the client, not the lawyer." *Id.* at 528.

58. United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part and vacated in part*, 109 S.Ct. 2619 (1989); Hicks v. Commonwealth, 439 S.E.2d 414 (Va. Ct. App. 1994) (presence of unrepresented, potential defendant did not defeat privilege).

59. *In re LTV Securities*, 89 F.R.D. at 604. The courts broadly define the term "codefendant" when determining the applicability of the joint defense privilege. *Id.*; *see also* Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("courts have extended the privilege to potential defendants") (citation omitted).

60. *McPartlin*, 595 F.2d at 1336 (investigator working for codefendant's attorney interviewed defendant with consent of counsel).

61. United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991).

62. *Cf. In re* Megan-Racine Associates, Inc., 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) (joint defense privilege "does not extend to communications made to representatives of quasi-legal professions unless such representatives act as *agents* for the attorney").

63. Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (privilege waived when privileged material "was shared with third-parties who were not pursuing a common legal strategy . . . ."); Western Fuels Ass'n v. Burlington Northern R.R.. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984) ("a party to joint defense communications may waive the attorney-client privilege by disclosing such confidential information to persons outside the scope of the joint defense relationship."); *see* United States v. Melvin, 650 F.2d 646 (5th Cir. 1981) ("there is no confidentiality when disclosures are made in the presence of a person who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality"); Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 393 (S.D.N.Y. 1975).

64. Metro Wastewater Reclamation District v. Continental Casualty Co., 142 F.R.D. 471, 478 (D. Colo. 1992) ("Waiver of the joint defense privilege requires the consent of all parties participating in the joint defense."); *see also* John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1683 (1991); *In re* Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 248 (4th Cir. 1990) ("a joint defense privilege cannot be waived without the consent of all parties who share the privilege") (citing Chahoon v. Commonwealth, 62 Va. (21 Gratt) 822, 842 (1871)); United States v. BiCoastal Corp., 1992 WL 693384, at *5 (N.D.N.Y. 1992) ("the joint defense privilege cannot be waived without the consent of all parties to the defense."); *In re Megan-Racine*, 189 B.R. at 572 ("The joint-defense privilege cannot be waived unless all the parties consent or where the parties become adverse litigants.").

65. *Western Fuels Ass'n*, 102 F.R.D. at 203 ("waiver of privileges relating to information shared in joint defense communication by one party to such communications will not constitute a waiver by any other party to such communications"). Theoretically, "the joint-defense privilege protects communicated information from disclosure, compelled or otherwise, by the additional parties to whom a party has spoken and the other parties' lawyer." Note, *supra* note 3, at 1284. The comment to proposed Federal Rule of Evidence 503—upon which Military Rule of Evidence 502(a) is based—posited that a joint defense member held a privilege only as to his own statements. *Id.* at n.67 (citing FED. R. EVID. 503(b)(3) advisory committee's note, 51 F.R.D. 315, 364 (1971)); *see also* STEPHEN A. SALTZBURG ET. AL, MILITARY RULES OF EVIDENCE MANUAL, Editorial Comment to MIL. R. EVID. 502 at 546 (3d ed. 1991) ("each client has a privilege not to have his statements divulged"); Perito, *supra* note 1, at 8 ("Because the privilege belongs to the party originally making a communication, the privilege cannot be waived in the current litigation except by that party."); STONE & TAYLOR, *supra* note 33, § 1.55, at 1-149 ("a waiver by one does not effect a waiver as to the other's confidences").

66. Note, *supra* note 3, at 1293 (discussing Proposed FED. R. EVID. 503 advisory committee's note, 51 F.R.D. 315, 364 (1971)). "Indeed, if any party could invoke the shield of secrecy, forbidding other parties from repeating their own statements, the parties would not know whether they would be more helped or hurt by revealing information." *Id.* Joint defense members would "fear sharing any information that might benefit them later, because the other parties could prevent them from revealing the information in court.") *Id.* at 1293-94.

67. 102 F.R.D. 201 (D. Wyo. 1984).

68. *Id.* at 203 (citing Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980)).

to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertently."[69] Accordingly, a party may only waive the privilege with respect to the information that party has provided, but not as to any information that party has received from other members of the joint defense group.[70]

Under the appropriate circumstances, courts will find a waiver of the privilege when parties to a joint defense relationship disclose confidential communications to a person outside the joint defense group—even a potential coaccused. In *United States v. Melvin*,[71] members of a joint defense group invited Charles Powell, a potential codefendant, to their meetings. All parties knew that Powell was unrepresented and had not agreed to any joint defense arrangement, but what they did not know was that Powell was acting as a government informant and was wearing a transmitter that permitted federal agents to record several conversations.[72]

The defendants persuaded the district court to dismiss the indictment, based on an impermissible government intrusion into the attorney-client relationship.[73] The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) reversed and remanded, holding that a "communication is protected by the attorney-client privilege—and . . . from intrusion under the Sixth Amendment—if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential."[74] The presence of a third party, "who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality," defeats the privilege.[75] The Fifth Circuit remanded, ordering the district court to determine whether, under the specific circumstances of the case, the joint defense defendants enjoyed a reasonable expectation of confidentiality in their conversations with Powell.[76]

Further, at least one court has held that conversations among codefendants outside the presence of *any* counsel are not privileged. In *United States v. Gotti*,[77] the defendants moved to suppress the results of electronic surveillance based, in part, on a violation of the joint defense privilege.[78] The federal district court rejected the challenge, refusing to extend the privilege to protect conversations between defendants in the absence of any attorney.[79]

The privilege dissolves as between any members of the joint defense arrangement that later face each other as adverse parties in subsequent litigation.[80] However, the litigation must be brought by one of the members to the joint effort; the privilege remains intact in any third-party proceeding.[81] Communication otherwise protected by the joint defense privilege does not lose its protected status solely because one of the joint defense members elects to cooperate with the prosecution and testify against the remaining defendants.[82]

Problem Areas for Both the Government and the Defense

Frequently, a defendant enters into some form of plea or cooperation agreement with the government that involves testi-

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69. *Id.* (citation omitted).

70. "Under [Mil. R. Evid. 502](a)(3), communications in a joint conference between clients and their respective lawyers may also be privileged; each client has a privilege not to have his statements divulged." SALTZBURG, *supra* note 65, at 546.

71. 650 F.2d 641 (5th Cir. 1981).

72. *Id.* at 642-43.

73. *Id.* at 643.

74. *Id.* at 645.

75. *Id.* 646.

76. *Id*. *But cf.* Hicks v. Commonwealth, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (presence of unrepresented, potential codefendant did not defeat joint defense privilege).

77. 771 F. Supp. 535 (E.D.N.Y. 1991).

78. *Id.* at 545. The electronic surveillance was part of an FBI investigation into organized crime in the New York City area. *Id*. at 538.

79. *Id.* at 545; *see also supra* note 13.

80. Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 393 (S.D.N.Y. 1975).

81. *Id.* at 395 ("i.e., before the Grand Jury").

82. *Cf.* United States v. Nelson, 38 M.J. 710, 715 (A.C.M.R. 1993) (citing, in part, Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5, 18 (1981) ("opining that the exception to the [joint client] privilege contained in Mil. R. Evid. 502(d)(5) is wholly inapplicable to courts-martial because a criminal proceeding is never an action 'between' any of the clients").

mony against codefendants. When that cooperating defendant has previously been part of a joint defense effort, a number of problems arise for both prosecutors and defense counsel.

Conflict-Based Attorney Disqualifications

Because of access to privileged information, defense counsel for the noncooperating accused may be the object of a disqualification motion.[83] The prosecutor may seek to disqualify defense counsel on the basis that counsel may not use privileged information against a former coaccused or because the inability to use privileged information may inhibit the attorney's efforts to zealously represent his client.[84]

Since the defendant's Sixth Amendment right to effective assistance of counsel[85] is endangered by the potential conflict of interest, and, concomitantly, by the defense attorney's inability to zealously represent his client through effective cross-examination of the government's witness, the government may demand the disqualification of all remaining defense counsel privy to joint defense communication.[86] Military courts have held that trial counsel have an affirmative duty to bring any potential conflict of interest to the military judge's attention;[87] federal courts have admonished prosecutors for not doing so.[88] As a matter of trial strategy, trial counsel should seek judicial inquiry into the conflict issue and place any waiver on the record, to forestall subsequent appellate attacks.[89]

The Government's Position

The theory for disqualification discussed above is well grounded in the law. The law treats each attorney involved in the joint defense effort as representing *all* clients. As the Court of Appeals for the Third Circuit explained: "[t]he basic rationale of the . . . theory is that, when two codefendants decide to join in a common effort, 'the attorney for each represented both for purposes of that joint effort.'"[90]

If the codefendant—turned government witness—is considered to have been a joint defense attorney's former client, a potential conflict of interest exists.[91] An accused "is entitled to defense counsel free of conflicts of interest,"[92] and the courts

83. Uelman, *supra* note 1, at 36.

84. "The prosecution might argue successfully that you cannot stand in an adversarial relationship with a witness who has provided you with privileged information in confidence." *Id.* at 36; *see also* Forsgren, *supra* note 11, at 220 ("In such a case, the government claims that the remaining joint defense attorneys cannot remain in the case without violating their ethical duties to the former member."); Scheininger & Aragon, *supra* note 4, at 11; United States v. Baker, 10 F.3d 1374, 1399 (9th Cir. 1993) ("could thus have been faced with either exploiting his prior, privileged relationship with the witness or failing to defend his present client zealously for fear of misusing confidential information").

85. The Sixth Amendment guarantees a criminal defendant "the 'right to the assistance of an attorney unhindered by a conflict of interest.'" United States v. Agosto, 675 F.2d 965, 969 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980) (Marshall, J., concurring in part and dissenting in part)); *see also* United States v. Met, 65 F.3d 1531, 1534 (9th Cir. 1995); United States v. Levy, 25 F.3d 146, 152 (2d Cir. 1994). Generally, the term "conflict of interest" refers to the situation in which a lawyer has competing loyalties or duties between (1) current clients, (2) a former and current client or (3) the attorney and a client. The Army's conflict rules are contained in rules of Professional Conduct 1-7 through 1-9. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 June 1992) [hereinafter AR 27-26].

86. Forsgren, *supra* note 11, at 220 & n.16 ("A conflict of interest therefore may prevent the joint defense attorney from rigorously cross-examining the government witness, which in turn may deny the defendant effective assistance of counsel in violation of the Sixth Amendment.") (citing United States v. Agosto, 675 F.2d 965, 969-71 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982)); *see Agosto*, 675 F.2d at 971 ("In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways: (a) the attorney may be tempted to use that confidential information to impeach the former client; or (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.").

87. United States v. Augusztin, 30 M.J. 707, 713 (N.M.C.M.R. 1990).

88. United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996) ("We therefore reiterate our admonition to the government in earlier cases to bring potential conflicts to the attention of trial judges."). Additionally, defense counsel possess a "duty to avoid conflicts of interest and to advise the court promptly upon discovery of a conflict . . . ." United States v. Fish, 34 F.3d 488, 493 (7th Cir. 1994).

89. *See Stantini*, 85 F.3d at 13 ("Convictions are placed in jeopardy and scarce judicial resources are wasted when possible conflicts are not addressed as early as possible."). When an actual conflict of interest exists, the accused "need not show prejudice in order to obtain a reversal of his conviction." *Augusztin*, 30 M.J. at 715. Further, [i]n view of the potential for prejudice when a defense counsel has divided loyalties, and in the absence of the informed consent of the accused, the prejudice is automatic. *Id*. Most conflict of interest issues are first raised on appeal, where the defendant is seeking a reversal of the conviction. *Agosto*, 675 F.2d at 970.

90. Government of Virgin Islands v. Joseph, 685 F.2d 857, 862 (3d Cir. 1982); *see also* United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) ("the attorney for each represented both for purposes of that joint effort."); Wilson P. Abraham Const. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); Note, *supra* note 3, at 1277 ("the attorney for one client becomes the attorney for all clients . . . ."). Some courts follow a slightly different rationale, reasoning that the third-party recipient of the confidential information acts as a representative of the client's attorney, that is, part of the client's defense team. Note, *supra* note 3, at 1277.

91. *See Agosto*, 675 F.2d at 971 ("When an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during the representation in the same or a substantially related matter, a conflict arises.") (citing Canon 4 & 5 of the ABA Code of Professional Responsibility) (multiple or successive representations).

presume the accused has not waived this right.[93] The military judge has a duty to inquire into possible conflicts of interest[94] and must dismiss the defense counsel from the case when an actual conflict exists, regardless of the accused's desires.[95] Indeed, even a "serious potential conflict" may necessitate disqualifying counsel.[96]

A strict interpretation of the conflict of interest rule may compel disqualification even though the confidential relationship has been terminated[97] and counsel acquired no information that could actually harm the former client.[98] However, the prevailing rule is that the attorney subject to a disqualification motion must actually have been privy to confidential information as a result of the joint defense relationship.[99]

Opposition to Disqualification

Opponents of disqualification argue that "disqualification not only impinges on a defendant's Sixth Amendment right to counsel of choice, it also threatens the very existence of joint defense arrangements, which serve important purposes in complex criminal cases."[100] Indeed, prosecutors could unfairly "eliminate a whole squadron of lawyers simply by turning one codefendant."[101] Further, "disqualification unfairly denies the right to counsel of choice to individuals who retain separate attorneys specifically to avoid conflicts of interest that multiple representation would otherwise present."[102]

Ethical Guidance

When deciding conflict of interest issues, courts look not only to the Sixth Amendment but also to applicable ethical standards.[103] The Army's Rules for Professional Conduct for Lawyers may require disqualification of the joint defense attorney.[104] Rule 1.9 (a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:

92. United States v. Caritativo, 37 M.J. 175, 178 (C.M.A. 1993); *see also* Wood v. Georgia, 450 U.S. 261, 271 (1980) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."). Regardless of the type of representation giving rise to the potential conflict—successive, multiple, or part of a joint defense relationship—the same general body of conflict of interest law applies. *See* United v. Levy, 25 F.3d 146, 153 n.5 (2d Cir. 1994) ("This Circuit . . . has not questioned the universal applicability of the Supreme Court's conflicts precepts and has consistently applied the same basic doctrine in all conflict-of-interest situations.").

93. United States v. Augusztin, 30 M.J. 707, 711 (N.M.C.M.R. 1990). Any waiver of conflict-free counsel must be voluntary, knowing, and intelligently made. *Id.* at 712. The "military judge alone . . . is responsible to undertake such an inquiry of the accused to determine whether there is a voluntary, knowing and intelligent relinquishment of his right to conflict-free counsel . . . ." *Id.* at 714.

94. United States v. Davis, 3 M.J. 430, 432-34 (C.M.A. 1977) (on the record inquiry required); *see also Wood*, 450 U.S. at 272 (possibility of conflict generates duty to inquire); *see* R.C.M. 901(d)(4) Discussion. Likewise, in the federal system, judges must inquire into possible conflicts of interest. United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994) ("the judge must inquire adequately into the potential conflict."); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) ("When a district court is sufficiently apprised of even the possibility of a conflict of interest, the court first has an 'inquiry' obligation.").

95. *See* Wheat v. United States, 486 U.S. 153, 162 (1988); *Augusztin*, 30 M.J. at 714-15.

96. *Wheat*, 486 U.S. at 164; *Augusztin*, 30 M.J. at 715; United States v. Baker, 10 F.3d 1374, 1399 (9th Cir. 1993); United States v. Kenney, 911 F.2d 315, 321 (9th Cir. 1990); United States v. Vasquez, 995 F.2d 40, 42 (5th Cir. 1993). A "remote possibility of conflict" does not warrant disqualification. *Agosto*, 675 F.2d at 972.

97. "Once a confidential relationship exists, the attorney ordinarily cannot act in a manner inconsistent to the client's interest in the same or any other matter related to the subject of the confidence. This is so even if the relationship then existing at the time of the disclosure was subsequently terminated." United States v. Hustwit, 33 M.J. 608, 613 (N.M.C.M.R. 1991).

98. United States v. McKee, 2 M.J. 981, 983 (A.C.M.R. 1976) ("The rule regarding conflicts of interests has been so strictly enforced that a lawyer cannot thereafter act as counsel against his former client in the same general matter even though while acting for his former client he acquired no knowledge which could adversely affect his former client in the subsequent adverse employment.") (citing United States v. Green, 18 C.M.R. 234, 238 (C.M.A. 1955)); *see also* United States v. Hustwit, 33 M.J. 608, 615 (N.M.C.M.R. 1991); United States v. Diaz, 9 M.J. 691, 693 (N.M.C.M.R. 1980). *But cf. Agosto*, 675 F.2d at 973 (court should seek a means of limiting the potential conflict short of disqualification).

99. Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp. 559 F.2d 250, 253 (5th Cir. 1977) ("there is no presumption that confidential information was exchanged as there was no direct attorney-client relationship . . ." and an attorney "should not be disqualified unless the trial court should determine that [the attorney] was actually privy to confidential information."); Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tex. App. 1995) (following federal precedent). *But cf.* United States v. Cheshire, 707 F. Supp. 235, 239 (N.D. La. 1989).

100. Forsgren, *supra* note 11, at 221.

101. Uelman, *supra* note 1, at 38.

102. Forsgren, *supra* note 11, at 221; *accord* Note, *supra* note 3, at 1283.

103. *See, e.g.*, *Wheat*, 108 S.Ct. at 1697; *Agosto*, 675 F.2d at 973; United States v. Cheshire, 707 F. Supp. 235 (N.D. La. 1989). A litigant may possess an independent basis to seek disqualification of an attorney pursuant to state ethics rules. United States v. Mett, 65 F.3d 1531, 1537 (9th Cir. 1995) ("A litigant may have a right to conflict-free counsel based on state professional ethics rather than the Sixth Amendment. If attorneys appearing before a federal court are bound by a certain body of state ethics rules, litigants may seek disqualification of other parties' attorneys in the same proceeding for violation of the conflicts provisions of those rules.")

> (1) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or
>
> (2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.[105]

Thus, Rule 1.9, which was designed to protect clients,[106] provides two ethical prohibitions: (1) adverse representation and (2) disadvantageous use of confidential information. The first prong prohibits an attorney from representing a second client when that client's interests are adverse to a former client whom the attorney represented in the same or a substantially related matter. Interests may be "materially adverse" when a discrepancy in testimony exists between the clients, when positions become incompatible at trial, or when the clients face substantially different degrees of liability.[107] When a former client appears at trial as an important prosecution witness against the current client, the interests of the two clients should be deemed materially adverse.[108] However, the former client may waive the disqualification after full disclosure.[109]

The second prong prohibits the use of confidential information against the former client.[110] Indeed, the comment to Rule 1.9 states: "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client."[111]

In the likely absence of a waiver by the cooperating former member of the joint defense effort, a reviewing authority must answer three inquiries: (1) is the cooperating witness a former "client" for purposes of the conflict of interest rule; (2) was confidential information disclosed; and (3) if confidential information was disclosed, is disqualification required? Military ethical authorities have not addressed these issues in the joint defense scenario and Rule 1.9 does not appear to have been drafted with the joint defense doctrine in mind.

Arguably, a codefendant may be a client for purposes of invoking the privilege, but not for purposes of ethical analysis. The attenuated relationship between a defendant's attorney and other members of the joint defense group may not rise to the level protected by the Rules of Professional Responsibility.[112]

Further, Rule 1.9's temporal language suggests that the former client to whom an ethical duty is owed is not the typical joint defense coaccused. Basically, Rule 1.9 addresses whether a lawyer can represent client *B* if he has previously represented client *A*. However, in a joint defense scenario, the attorney already represents *B* at the time he creates an attorney-client relationship with coaccused *A*. All attorney-client relation-

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104. In determining conflict-of-interest issues, it is appropriate for courts to consider applicable ethical guidelines. *See e.g. Wheat*, 108 S.Ct. at 1697; United States v. Cheshire, 707 F. Supp. 235, 238-41 (N.D. La. 1989).

105. AR 27-26, *supra* note 85, Rule 1.9, at 13.

106. *Id.* Rule 1.9, cmt. ("Disqualification from subsequent representation is for the protection of clients . . . ."); *see* Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyer*, 124 MIL. L. REV. 1, 24 n.148 (1989) ("the disqualification rule is designed to benefit the former client . . . .").

107. *See* AR 27-26, *supra* note 85, Rule 1.7 cmt. at 12. Rule 1.9 refers to Rule 1.7 for a determination of adverse interests. The comment to Rule 1.9 states, "The principles in Rule 1.7 determine whether the interests of the present and former client are adverse."

108. Interpreting an identical Arizona Rule 1.9, the Arizona State Bar opined that when a former client will appear as a key prosecution witness against the attorney's present client, the interests of the two clients are materially adverse. The Bar opinion reasoned: the client's "objective at trial will be to discredit [the former client's] testimony in any way feasible, including the possible suggestion of [the former client's] own criminal culpability." Ariz. Ethics Op. 91-05, at 8 (Feb. 20, 1991).

109. Ingold, *supra* note 106, at 24. Not all conflicts may be waived; an attorney cannot properly seek a waiver "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances . . . ." AR 27-26, *supra* note 85, Rule 1.7 cmt. at 12; *see also* Professional Conduct Of Judge Advocates, Judge Advocate General Instruction 5803.1A, Rule 1.7, cmt. 4 (13 July 1992) [hereinafter Navy R.P.C.]; GARY L. STUART, THE ETHICAL TRIAL LAWYER 28.1, at 419 (State Bar of Arizona 1994) (Arizona Ethical Rule 1.7, cmt.). Further, in obtaining such consent, a lawyer may not approach the former client directly if that person is represented by another lawyer. AR 27-26, *supra* note 85, Rule 4.2 & cmt., at 26 ("This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.").

110. Rule 1.6 permits a lawyer to reveal confidential information if the client consents; and, without client consent, to prevent certain future criminal misconduct, in cases of certain lawyer-client controversies, or when required or authorized by law. AR 27-26, *supra* note 85, Rule 1.6, at 9. In the case of a codefendant cooperating with the prosecution, consent to reveal confidential information is unlikely and Rule 1.6's exception would normally be inapplicable. Some courts presume that an attorney has received confidential communications in the course of representation.

111. AR 27-26, *supra* note 85, Rule 1.9, cmt. at 14.

112. The comment to Rule 1.9 states that a reviewing body may examine the attorney's "degree" of representation. AR 27-26, *supra* note 85, Rule 1.9, cmt. at 14 ("The lawyer's involvement in a matter can also be a question of degree.").

ships, and all terminations of such relationships, have occurred in the same matter.

The comment to Rule 1.9 lends some support to this interpretation. Illustrations speak in terms of creating new attorney-client relationships after terminating a prior one. For example, "a lawyer could not properly seek to rescind on behalf of a *new* client a contract drafted on behalf of a former client."[113] Additionally, an attorney who represents an accused at trial cannot later represent a new client (the government), by serving as government counsel in the appellate review of the case.[114] Albeit the attorney's representation of the coaccused is not "wholly distinct" from the underlying controversy, but again, the representation has not risen to the level normally envisioned by the ethical rules.[115] In short, Rule 1.9 may not apply to joint defense relationships.

A recent opinion of the American Bar Association (ABA) applying substantially similar ethical rules offers only limited, and mixed, guidance. The ABA examined an attorney working in an insurance defense firm who had represented a member of a joint defense consortium, but who had left the firm and had been approached by a client seeking to file suit against other members of the consortium.[116] In a formal opinion, the ABA posited that the lawyer incurred an obligation to his former client not to disclose confidential information obtained as a result of the joint defense relationship unless the former client consented to disclosure.[117] However, the ABA's position differed with respect to the lawyer's obligation to other consortium members, who had provided information in confidence. The ABA opined that the lawyer had a "fiduciary obligation to the other members of the consortium, which might well lead to disqualification" but that the lawyer did not labor under an ethical obligation to the other consortium members.[118]

Key to the ABA's analysis was the fact that a joint defense agreement specifically stated that each lawyer did not represent the other members of the consortium.[119] Accordingly, the other members of the consortium were not the lawyer's former clients for purpose of the ethical analysis. The lack of an attorney-client relationship distinguishes the ABA opinion from the underlying premise of the joint defense doctrine that the law views each attorney involved in the joint defense effort as representing all clients.[120]

Relying on the ABA rationale, counsel may successfully argue that by entering into a formal joint defense agreement defining any attorney-client relationships, the parties to the agreement are beyond the reach of Rule 1.9. The counter argument is that the ABA opinion suggests that even if Rule 1.9 is inapplicable because the requisite attorney-client relationship does not exist, joint defense attorneys owe a fiduciary duty to codefendants that may necessitate disqualification.

Assuming arguendo that the cooperating coaccused is a client for Rule 1.9 purposes, an exchange of confidential communications must, exist prior to any potential conflict of interest. Although military courts have not addressed the issue, the weight of authority posits that there is no presumption that confidential information has been imparted as part of a joint defense relationship.[121] Accordingly, the military judge must conduct such an inquiry without revealing the substance of any privileged information to the government. In *United States v. Anderson*,[122] the United States District Court for the Western District of Washington satisfied its duty of inquiry by appointing an independent counsel. This attorney interviewed all relevant parties and prepared a report for the court, which was filed

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113. AR 27-26, *supra* note 85, Rule 1.9 cmt. at 14 (emphasis added); *see also id.* ("When a lawyer has been directly involved in a specific transaction, *subsequent* representation of other clients with materially adverse interests clearly is prohibited.") (emphasis added); *id.* ("The underlying question is whether the lawyer was so involved in a particular matter that the *subsequent* representation can be justly regarded as a changing of sides in the matter in question.") (emphasis added).

114. *Id.* ("So also a lawyer who has defended an accused at trial could not properly act as appellate Government counsel in the appellate review of the accused's case.").

115. The comment asks "whether the lawyer was so involved in a particular matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." AR 27-26, *supra* note 85, Rule 1.9 cmt. at 14. Typically, the accused's attorney continues to advocate the defense position; it is the cooperating co-accused who has moved from the defense camp into the government's camp.

116. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) [hereinafter ABA Formal Op. 95-395] ("Obligations Of A Lawyer Who Formerly Represented A Client In Connection With A Joint Defense Consortium").

117. *Id.* at 3.

118. *Id.; see* Wilson P. Abraham Const. v. Armco Steel Corp., 559 F.2d 250, 251 (5th Cir. 1977) (an attorney in a joint defense relationship breaches his "fiduciary duty" if he uses information obtained as a result of that relationship to the detriment of the codefendants).

119. ABA Formal Op. 95-395, *supra* note 116, at 1.

120. *See supra* note 85 and accompanying text.

121. *See supra* note 95.

122. 790 F. Supp. 231 (W.D. Wash. 1992).

under seal and reviewed in camera.[123] The district court then issued its opinion based on this report.

Finally, assuming the first two inquiries are answered affirmatively, the court must determine if disqualification is mandated. The military judge enjoys some discretion in this area. In *United States v. BiCoastal Corp.*,[124] the United States District Court for the Northern District of New York merged ethical and Sixth Amendment analysis, balanced the interests of all parties,[125] and eventually determined that the interests of the codefendants in retaining their counsel heavily outweighed any competing governmental interests.[126] In *Anderson*, the federal district court opined that even if confidential information was exchanged, it was not of sufficient importance to affect counsel's ability to effectively cross-examine the former joint defense member.[127]

It is significant that, even if not disqualified, counsel may not use confidential information obtained as a result of the joint defense relationship to the detriment of the cooperating witness. Of the three known federal decisions addressing the issue, all have recognized this restriction on counsel.[128]

Limited Case Precedent

On at least three occasions, federal prosecutors have been defeated in their efforts to disqualify opposing counsel because of a conflict of interest created by joint defense relationships.[129] Although in each case the government lost on the specific facts, the courts accepted the government's basic position that joint defense relationships can create conflicts of interest necessitating disqualification of counsel.[130] Accordingly, the issue remains ripe for litigation.

The Big Picture

In making a disqualification determination, a court must ultimately balance the rights and interests of the various parties, given the specific facts of the case. Permeating throughout that analysis is the particular jurisdiction's determination of the value associated with the particular privilege. Because they have recognized, but not interpreted, the joint defense privilege, military courts must determine how fervently military jurisprudence will embrace it.

Any evidentiary privilege is a reflection of society's balancing of various public policy considerations.[131] Arguably, joint defense relationships serve important public interests and should not be easily eviscerated by placing an unrestrained disqualification sword in the government's hands. Positive public policy considerations include encouraging litigants to reduce effort and costs by sharing limited resources;[132] facilitating the presentation of "a coherent and plausible defense rather than one riddled with immaterial inconsistencies;"[133] "encouraging full disclosure to attorneys in order to allow maximum legal representation";[134] and serving "to expedite trial preparation and the trial itself."[135]

Conversely, any privilege limits the factfinder's ability to ascertain the truth and should be interpreted narrowly.[136] Countervailing considerations against encouraging joint defense relationships focus on their potential for abuse. Joint defense

123. *Id.* at 232.

124. No. 92-CR-261, 1992 WL 693384 (N.D.N.Y. Sept. 28, 1992).

125. *Id.* at *2 ("The court must evaluate the interests of the defendant, the Government, the witness, and the public in view of the facts of the particular case.").

126. *Id.* at *3. In finding against disqualification, the court was impressed with the complex nature of the case and the lack of concern expressed by the former clients. *Id.* at *3-4.

127. United States v. Anderson, 790 F. Supp. 231, 232 (W.D. Wash. 1992).

128. *Id.*; *Bicoastal Corp.*, 1992 WL 693384 at *2; United States v. McDade, No. 92-249, 1992 WL 187036 (E.D. Pa. July 30, 1992).

129. Forsgren, *supra* note 11, at 238-39 (citing United States v. Anderson, 790 F. Supp. 231 (W.D. Wash. 1992); United States v. McDade, 1992 U.S. Dist. LEXIS 11447 (E.D. Pa. July 30, 1992); United States v. Bicoastal Corp., 1992 U.S. Dist. LEXIS 21445 (N.D.N.Y. Sept. 28, 1992)).

130. *Id.*

131. McCormick On Evidence § 72, at 171 (1984) ("Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."). The rationale for protecting confidential communications, such as between an attorney and client, "is that public policy requires the encouragement of the communications without which these relationships cannot be effective." *Id, see also* Note, *supra* note 3, at 1287 ("balancing of the benefits and costs of recognizing the privilege.")

132. Uelman, *supra* note 1, at 38 ("public policy should encourage litigants to share the expense of consulting experts").

133. Perito, *supra* note 1, at 40.

134. *Id.*; *see also* Note, *supra* note 3, at 1287 ("the joint defense privilege spurs beneficial disclosures among parties with common interests . . .").

135. People v. Pennachio, 637 N.Y.S.2d 633, 635 (Sup. Ct. Kings County, 1995).

relationships permit defense attorneys to stymie the government's investigative efforts. Joint defense counsel can organize a unified defense, restrict the flow of information to government investigators while simultaneously sharing all available information among themselves, and resolve inconsistencies in the defense version of the facts, (i.e., get their stories straight).[137] Further, such relationships limit the government's ability to persuade individual defendants to testify against codefendants.[138]

Outside of the military, prosecutors view the joint defense doctrine with disfavor in part because of its inherently coercive nature in organizational settings. Typically, when a corporation learns it is under criminal investigation, key corporate employees are presented with the option of bearing their own legal expenses or accepting the services of an attorney chosen by—and friendly to—the corporation.[139] The corporation then enters into a joint defense arrangement with the individual attorneys.[140] In addition to bearing the potential burden of substantial legal fees, employees who elect not to cooperate in a joint defense run the risk of being viewed as disloyal, which may affect subsequent employment decisions such as promotions, transfers, or layoffs.

The factual scenario giving rise to concerns of abuse in a civilian organizational setting does not exist to the same extent in the military criminal context. Military accused are afforded free counsel, regardless of their income level, and employment decisions do not depend on acceptance of military attorneys. The two greatest mechanisms for controlling codefendants in organizational settings simply do not exist in the armed forces.

Improper Dissemination and Use of Privileged Information

An individual member of the joint defense effort may not unilaterally disclose confidential information received from other joint defense members.[141] However, preventing dissemination of privileged information to the government and enforcing any joint defense agreements may prove difficult for the defense.[142]

In *Kiely v. Raytheon Co.*,[143] a federal district court viewed the enforcement of a joint defense agreement as being contrary to public policy. John Kiely and his employer, Raytheon, entered into a joint defense agreement after learning that they were under investigation for "receiving and disseminating unreceipted classified DOD documents."[144] Kiely sued Raytheon, in part, for breach of contract after the defense contractor negotiated a plea agreement with the DOJ, without informing Kiely or his lawyer.[145]

The United States District Court for the District of Massachusetts dismissed the lawsuit, positing that any breach failed to cause Kiely any cognizable legal harm for which relief was available.[146] The court opined that performance of this type of contract "in accordance with the promises alleged would have interfered with a federal criminal investigation and would

136. McCormick on Evidence § 74 (1984) ("Since privileges operate to deny litigants access to every man's evidence, the courts have generally construed them no more broadly than necessary to accomplish their basic purposes.").

137. Bennett, *supra* note 5, at 450 ("A senior Department of Justice prosecutor explained '[p]rosecutors are uneasy because they see in [confidentiality agreements], even unintentionally, an opportunity to get together and shape testimony.'"); *see also* Forsgren, *supra* note 11, at 230-31 (Prosecutors argue that a "joint defense arrangement allows its members to shape testimony and perhaps even coordinate perjury.").

138. "Prosecutors do not like joint defense agreements for the same reason defense lawyers favor them: [t]hey can limit the pressure the government can bring to bear on an individual defendant, and they give individual defendants an overall view of multiparty cases." Scheininger & Aragon, *supra* note 4, at 11-12; *see also* Forsgren, *supra* note 11, at 231 (sophisticated criminals can prevent less culpable subordinates or coconspirators from cooperating with the government); *cf.* United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978) (a single attorney representing multiple clients "creates the possibility of defendants 'stone-walling'—obstructing Government attempts to obtain cooperation of one of a group of defendants"). *Contra* Perito, *supra* note 1, at 40 (defendants are not barred from cooperating, they are only unable to disclose confidential information derived from the joint defense effort).

139. *See e.g.* Kiely v. Raytheon Co., 914 F. Supp. 708, 710 (D. Mass. 1996) ("Raytheon hired and paid for a lawyer to represent Kiely."). Usually, the corporation offers to indemnify the corporate employee for legal expenses, but only if the employee accepts an attorney chosen by the corporation. The corporation defends this practice on the grounds that corporate indemnification provisions require the offer of such legal representation and that the corporation should be able to pick a "qualified" attorney to fill that role.

140. *See, e.g.*, *Kiely*, 914 F. Supp. at 710.

141. *See supra* notes 64-66 and accompanying text.

142. "Though in theory former codefendants may be able to prevent one another from breaching a former joint defense privilege even before trial, that is a hard right to enforce. You simply cannot monitor [the former joint defense member] every minute. You may not be able to show that any given piece of prosecution knowledge came from a breach by [the former member]." Uelman, *supra* note 1, at 38.

143. 914 F. Supp. 708 (D. Mass. 1996).

144. *Id.* at 710.

145. *Id.* at 711. The day after Raytheon entered into the plea agreement, the DOJ indicted—and subsequently convicted—Kiely for conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *Id.*

therefore have been contrary to public policy, if not actually illegal."[147] The court continued:

> An agreement by Kiely and Raytheon not to talk to the government without the other's consent would have given either a potential veto over the other's furnishing relevant, truthful information to investigators of criminal activity. Such a veto would obviously interfere with the investigation and might even in some circumstances amount to a criminal obstruction of justice. At the very least, it would present a sufficiently substantial impediment to the achievement of a desired public good that a contract arranging for such a veto power ought not to be sanctioned by enforcement.[148]

Although the remaining members of the joint defense group can prevent the cooperating witness from testifying as to any privileged matter and from introducing any privileged object or writing,[149] the defense may not be able to stop the former joint defense member from providing privileged information to the government. Attorney proffers and witness debriefings provide ample opportunity for privileged information to be disclosed.[150] However, this seemingly advantageous position for the prosecution may actually undermine the government's case.

Because the joint defense privilege is an extension of the attorney-client privilege, the defense could argue that the appropriate remedy for any unwarranted governmental intrusion into the joint defense relationship should parallel those remedies traditionally afforded to improper intrusions into the attorney-client relationship. Courts have excluded evidence after finding an improper intrusion into the attorney-client relationship on Fourth Amendment grounds, and as an infringement on the Fifth Amendment right to due process and the Sixth Amendment right to effective assistance of counsel.[151] A court may suppress not only evidence directly attributable to the Constitutional violation, but also any "fruits" or derivative evidence of the violation.[152]

While suppression of the evidence is the normal remedy, dismissal may be appropriate in extreme cases. In cases involving government intrusion into the attorney-client relationship violative of the Sixth Amendment, the defendant must establish demonstrable prejudice before dismissal is appropriate.[153] Additionally, a court may dismiss the case in particularly outrageous cases of governmental misconduct.[154] The outrageous conduct defense is premised on a Fifth Amendment due process violation.[155] For Fifth Amendment violations, dismissal may be appropriate "where continuing prejudice from the constitutional violation cannot be remedied by suppression of the evidence."[156] Such a violation is rare,[157] existing only when the

146. *Id.* at 713-14. The only harm suffered by Kiely was his inability to strike a bargain with the government before Raytheon. *Id.* at 714.

147. *Id.* at 713. Kiely alleged that a written agreement required the parties to preserve information as confidential. *Id.* Further, an additional oral agreement required the defense contractor to notify Kiely of an intention to enter into plea negotiations and to disclose information that the company intended to reveal to the DOJ. *Id.*

148. *Id.* at 714.

149. MCM, *supra* note 9, MIL. R. EVID. 501(b)(4); *see also* United States v. Stotts, 870 F.2d 288, 290 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989) (codefendants precluded defendant from calling his former attorney to testify about statements made in a joint defense meeting concerning the defendant's innocence).

150. The military and federal systems recognize a crime fraud exception to the attorney client privilege. United States v. Smith, 35 M.J. 138, 140 (C.M.A. 1992) ("The lawyer-client privilege does not apply to 'communications . . . which further a crime or fraud.'") (citing United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989)). This exception should apply to the joint defense privilege, particularly when the cooperating former joint defense member knows that other joint defense members are obstructing justice by hiding or destroying evidence; or providing false testimony in interviews, before the grand jury or in an Article 32 hearing.

151. Stone & Taylor, *supra* note 33, at 1-7 (citations omitted). "A Fifth Amendment due process violation may occur when government interference in an attorney-client relationship results in ineffective assistance of counsel or when the government engages in outrageous conduct." United States v. Marshank, 777 F. Supp. 1507, 1519 (N.D. Cal. 1991). If the misconduct occurs after the initiation of adverse criminal proceedings, government interference with the attorney client relationship may violate the Sixth Amendment right to counsel. *Id.* Further, the fruit of the poisonous tree exclusionary doctrine "applies to evidence obtained in violation of the Sixth Amendment right to counsel as well as the Fifth Amendment right to due process." *Id.* at 1519 n.11 (citations omitted).

152. People v. Pennachio, 637 N.Y.S.2d 633, 635 (Sup. Ct. Kings County, 1995) (in the context of a joint defense relationship, "if the defendants can show that the prosecutor interfered with their attorney-client relationship or otherwise show government misconduct, suppression of derivative evidence would be appropriate"); *see* United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991) (remanding to determine if government made derivative use of information protected by joint defense/attorney-client privilege).

153. United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987) (criminal defense attorney wore a "body bug" for government while talking to client) (citing United States v. Morrison, 449 U.S. 361 (1981)); *see also* United States v. Melvin, 650 F.2d 641 (5th Cir. 1981).

154. *See e.g. Marshank*, 777 F. Supp. at 1524 (dismissing indictment). "It is an accepted principle of due process that police misconduct may be so outrageous that the government will be absolutely barred from prosecuting the case." United States v. Langer, 41 M.J. 780, 784 (A.F. Ct. Crim. App. 1995).

155. United States v. Ahluwalia, 807 F. Supp. 1490, 1494 (N.D. Calif. 1992) *aff'd* 30 F.3d 1143 (9th Cir. 1994) (citing United States v. Russell, 411 U.S. 423 (1973)); *accord Langer*, 41 M.J. at 784.

government's misconduct is "fundamentally unfair and 'shocking to the universal sense of justice.'"[158]

Finally, confidential communications protected by the attorney-client privilege are inadmissible at trial and erroneous admission of such evidence may afford the accused an opportunity for post-trial redress. When the error is prejudicial, the findings of guilt may be set aside.[159] Harmless error may still cause a reassessment of the sentence.[160] For example, in *Hicks v. Commonwealth*,[161] the Court of Appeals of Virginia, finding prejudicial error, reversed a possession of heroin conviction after the trial judge erroneously admitted the defendant's confidential admissions to a codefendant's attorney, in violation of the joint defense privilege.[162]

When the government has not deliberately compelled the disclosure of information privileged by virtue of the existence of a joint defense relationship, suppression of evidence directly or indirectly obtained from such disclosure would be inappropriate and contrary to public policy.[163] Under such circumstances there is no governmental misconduct to deter.

Further, if the inadvertent or innocent receipt of privileged information threatens the government's case, prosecutors will be extremely hesitant to accept the cooperation of former joint defense codefendants. Under such circumstances, entering into a joint defense relationship will effectively bar future cooperation agreements[164] and ultimately threaten the continued existence of joint defenses in criminal cases. Defense counsel will be extremely hesitant to enter into any form of joint defense relationship that may eventually foreclose the possibility of securing an advantageous plea agreement.

Keeping the Genie in the Bottle

What can the military defense counsel for joint defense member *A* do to preclude either the government or counsel for joint defense member *B* from using privileged information in *B*'s Article 32 hearing and court-martial? In short, counsel should raise the privilege wherever and whenever possible.

Initially, *A*'s attorney should seek to preclude use of the privileged communication early in the criminal process by contacting both defense and trial counsel to make them aware of the issue and request that they not use the privileged communications. Counsel should remind trial counsel of the United States Court of Military Appeal's broad admonition in *United States v. Ankeny*, that the government is precluded from using improperly divulged privileged communications "in any way."[165] Further, *A*'s defense counsel should refer *B*'s counsel to Rules 1.6 and 1.9 of the *Army's Rules for Professional Conduct for Lawyers*, arguing that *A* was his client by virtue of the joint defense doctrine and that any unauthorized disclosure of joint defense communication would be unethical.

Nothing precludes *A*'s counsel from filing an objection to the use of the privileged information with *B*'s Article 32 investigating officer. The law of privileges applies during an Article 32 investigation,[166] and third parties may invoke the attorney-client privilege regarding their confidential communications.[167]

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156. *Marshank*, 777 F. Supp. at 1521-22 (citations omitted).

157. *Ofshe*, 817 F.2d at 1516 (invoked only "in the rarest and most outrageous of circumstances.").

158. *Marshank*, 777 F. Supp. at 1523 (citation omitted); *see also* United States v. Russell, 411 U.S. 423, 432 (1973); United States v. Bell, 38 M.J. 358, 373 (C.M.A. 1993) (Gierke, J., dissenting).

159. *See e.g. Nelson*, 38 M.J. at 716-17 (rape conviction reversed after communications protected by attorney-client privilege were erroneously admitted over defense objection); United States v. Moreno, 20 M.J. 623 (A.C.M.R. 1985) (premeditated murder conviction set aside after improper admission of confidential communication protected by clergy privilege).

160. United States v. Henson, 20 M.J. 620 (A.C.M.R. 1985) (attorney-client privilege); *see* United States v. Tipton, 23 M.J. 338, 345 (C.M.A. 1987) (marital privilege).

161. 439 S.E.2d 414 (Va. Ct. App. 1994).

162. *Id.* at 416.

163. *See* People v. Pennachio, 637 N.Y.S.2d 633, 637 (Sup. Ct. Kings County 1995) (the privilege "should not be extended to exclude evidence derived from a voluntary disclosure of privileged common interest communications").

164. United States Sentencing Guideline (U.S.S.G.) section 5 K1.1 provides that, upon motion by the United States, a court may depart downward from the sentencing guidelines to reflect the defendant's substantial assistance. Frequently, defendants seek to cooperate with the prosecution in order to reduce their sentences. A defendant's ability to earn a 5K departure may be adversely affected by his inability to testify about incriminating statements made by codefendants in joint defense meetings or about information obtained indirectly as a result of information obtained through the joint defense relationship.

165. 30 M.J. 10, 16 (C.M.A. 1990).

166. United States v. Martel, 19 M.J. 917, 922 (A.C.M.R. 1985); MCM, *supra* note 9, MIL. R. EVID. 1101(d).

167. United States v. Romano, 43 M.J. 523, 529 (A.F. Ct. Crim. App. 1995).

The right to assert the attorney-client privilege applies equally to nonparty joint defense members questioned about communications protected by the joint defense doctrine.[168] Acting on behalf of *A*, counsel should be able to lodge an objection with *B*'s investigating officer to preclude consideration of privileged communications even though *A* is not testifying at the proceeding.

Similarly, nothing in the *Manual for Courts-Martial* or military case law precludes *A*'s counsel from seeking appropriate relief at an Article 39(a) session before *B*'s military judge. Military Rule of Evidence 501(b) states that a claim of privilege may be raised " by *any* person" to "[p]revent another from being a witness or disclosing any matter or producing any object or writing." Indeed, Military Rule of Evidence 512(a)(2) contemplates the invocation of a privilege by a third party.[169]

Conclusion

The joint defense doctrine provides a potentially effective means for parties with common legal interests to organize their efforts and present a unified front in virtually any type of legal proceeding.[170] Joint defense relationships are particularly effective in criminal cases involving multiple accused. Defense counsel can monitor the flow of information to the prosecution, share information and resources among themselves, resolve insignificant factual inconsistencies or questions, identify and investigate important inconsistencies, and prepare a unified legal defense. In short, the joint defense doctrine contributes to the quality of legal representation.

However, joint defense relationships are fraught with potential problems. Defense counsel must ensure that the prerequisites for the privilege have been satisfied before exchanging information[171] and must be prepared to contend with the ethical and tactical problems associated with defecting joint defense members. Similarly, prosecutors should be prepared to meet the litigation challenges presented by a unified defense front and be cognizant of the legal issues raised once a joint defense member defects to the government.

The joint defense doctrine presents both advantages and danger to both sides of the bar and presents a fertile field for litigation. Ultimately, the military courts must determine the parameters of this legal doctrine.

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168. *Id.*

169. The rule provides, in relevant part: "The claim of privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party." MCM, *supra* note 9, MIL. R. EVID. 512(a)(2).

170. "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." FED. R. EVID. 1101(c); *see also* MCM, *supra* note 9, MIL. R. EVID. 1101(b) ("at all stages of all actions, cases, and proceedings"). In the federal system, privileges apply before the grand jury, extradition proceedings, criminal preliminary examinations, sentencing determinations, probation revocation proceedings, arrest and search warrant determinations and bail release proceedings. FED. R. EVID. 1101(d). The military rule of privilege applicability is equally broad. Privileges apply at all courts-martial, Article 39(a) sessions, Article 32 investigative hearings, Article 72 vacation of suspension proceedings, and pretrial restraint determinations. MCM, *supra* note 9, MIL. R. EVID. 1101.

171. Because of the judicial view that a joint defense attorney represents all joint defense members for purposes of the common defense effort (*see supra* note 90), the potential problems associated with the break up of joint defense relationships, and the assumption of additional obligations to other members of the joint defense effort by the accused's attorney, Army Rule 1.7 of the *Rules of Professional Conduct for Lawyers* may apply. Accordingly, an attorney should discuss with the client the possible disadvantages and additional obligations associated with joint defense relationships, and obtain the client's consent, before entering into such a relationship. *See* AR 27-26, *supra* note 85, Rule 1.7, at 11. Further, Rule 1.6(a) appears to mandate client consent before an attorney may reveal confidential communications to other joint defense counsel. *Id.* Rule 1.6, at 9 ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."); *see Romano*, 43 M.J. at 529 n.10 ("obtain client consent before revealing information to another defense lawyer, even one whose client appears to be in concert of interest").